

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SCOTT KASEBURG, et al.,

11 CASE NO. C14-0784 JCC

12 Plaintiffs,

13 ORDER GRANTING SOUND
14 TRANSIT'S MOTION FOR
15 PARTIAL SUMMARY JUDGMENT

16 v.

17 PORT OF SEATTLE, et al.,

18 Defendants.

19 This matter comes before the Court on defendant Central Puget Sound Regional Transit
20 Authority's ("Sound Transit") cross-motion for partial summary judgment on whether
21 construction and operation of light rail is consistent with BNSF's easements (Dkt. No. 119).
22 Having thoroughly considered the parties' briefing, the relevant record, and the oral argument on
23 November 9, 2015, the Court hereby GRANTS the motion for the reasons explained herein.

24 **I. BACKGROUND**

25 The facts in this case are well established, so we will not belabor them. A few points bear
26 emphasis.

27 Burlington Northern Santa Fe Railway Company (BNSF) established a right of
28 way/railway corridor (the "corridor") skirting the eastern shores of Lake Washington. By 2008,
29 BNSF no longer used the corridor for freight rail service. (Dkt. No. 36 at 2.) In accordance with

1 the railbanking process, BNSF entered into a series of agreements with the Port of Seattle and
2 King County to transfer BNSF's interests in the corridor to the Port and to designate King
3 County as the Interim Trail Manager. (Dkt. No. 36 at 6.) The Port then assigned some of the
4 rights it received from BNSF to Sound Transit for the construction of a High Capacity Transit
5 System. (Dkt. No. 83 at 41-44.)¹ Sound Transit intends to use these rights to construct a light rail
6 in the corridor. (Dkt. No. 119 at 1-2.)

7 Like an ordinary commuter rail, a light rail transports passengers in vehicles running on
8 steel railroad tracks between fixed stations. (Dkt. No. 74 at 5.) Light rails differ from commuter
9 rails in that they run on electricity carried through an overhead catenary system, and their
10 vehicles are usually smaller. (*Id.*) In addition to the catenary system, light rails also require the
11 installation of communication and signaling facilities, which may involve burying conduit
12 underground. (*Id.*)

13 For the purpose of this motion, Sound Transit makes two claims. First, "that Sound
14 Transit's light rail operations constitute a railroad operation within the scope of the preserved
15 BNSF easements." (Dkt. No. 119 at 1-2.) And second, "that the light rail railroad track and
16 associated facilities can be constructed underground, on the surface, or above the ground, all as
17 dictated by sound railroad engineering practices and operational needs." (*Id.*)

20 II. DISCUSSION

21 A. Sound Transit Does Not Need to Reactivate Its Railroad Easement

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25 ¹ The rights assigned to Sound Transit were created by the Lake Washington Belt Line
26 Deed easement and Condemnation Judgment easement, which we have termed the "Corridor
Easements." The Corridor Easements are again the easements at issue in this Order.

1 In the Court's previous order, we ruled that the Corridor Easements create railroad
2 easements. (Dkt. No. 138 at 20.) Plaintiffs argue, however, that Sound Transit cannot construct a
3 light rail in the corridor. For the following reasons we find that Plaintiffs' arguments are without
4 merit—in fact, many of them were already disposed of in previous orders, thus we will not
5 address those here.

6 Plaintiffs initially argue, without providing any authority, that "Congress did not intend to
7 allow third parties or other governmental entities to take advantage of the Act and utilize the
8 rights-of-way for other purposes other [sic] than trail use or reactivation." (Dkt. No. 134 at 7.) By
9 "reactivation," Plaintiffs seem to be referring to reactivation as a freight railroad. In fact, the
10 Surface Transportation Board—the governmental entity responsible for regulating railroads—has
11 ruled conclusively that light rails may be built on railbanked easements that are also used as
12 trails. *The Baltimore & Ohio R.R. Co-Abandonment & Discontinuance of Serv.-In Montgomery*
13 *Cnty., Md, & the D.C.*, AB-19, 1990 WL 287371, at *2 (DCSS Feb. 22, 1990) (finding that a
14 government-operated light rail was compatible with the trail use of a railbanked easement and
15 the potential restoration of freight rail service); *C.S.X. Transp., Inc.-Abandonment Exemption-In*
16 *Monroe and Owen Counties, IL*, AB-55 (SUB 514X), 1997 WL 598035, at *1 n.5 (Sept. 19,
17 1997) ("Nothing in the statute or our regulations precludes a right-of-way from being used for
18 mixed highway (or light rail) and recreational use.") The STB has ruled that railbanked
19 easements may be put to other purposes as well, such as being used as a utility corridor. *Kansas*
20 *E. R.R., Inc.-Abandonment Exemption-in Butler & Greenwood Counties, KS*, AB-563 (SUB 1X),
21 2006 WL 1516602, at *3 (June 1, 2006) (allowing a railbanked right of way to be used as a
22 utility corridor).

1 Plaintiffs argue at greater length that Sound Transit cannot construct a light rail in the
 2 corridor because it has not, under the procedures established by the STB, reactivated the
 3 railbanked easement for use as a railroad. But the STB does not possess jurisdiction over any
 4 passenger railroad operated by a “local government authority”—a category that plainly includes
 5 Sound Transit, a regional transit authority. 49 U.S.C. § 10501(c)(2)(A); *see also* 49 U.S.C.A. §
 6 5302(10)(A) (defining “local government authority” as “a political subdivision of a State”).²
 7 Therefore, Sound Transit does not need to petition the STB for reactivation. *S. Pac. Transp. Co.-*
 8 *Abandonment Exemption-Los Angeles Cnty., CA*, 9 I.C.C.2d 385, 390 (I.C.C. Feb. 12, 1993)
 9 (“We have never asserted jurisdiction over the ability of railroads to allow non-carriers to
 10 conduct non-jurisdictional activities, such as rail commuter service, on their excess real estate
 11 when regulated rail service will not be affected thereby.”). STB’s only role in this instance is to
 12 ensure that the operation of a passenger railroad does not interfere with the potential reactivation
 13 of a freight railroad. *Baltimore & Ohio*, 1990 WL 287371, at *3 (DCSS Feb. 22, 1990) (“While
 14 we retain jurisdiction over the right-of-way to ensure that the statutory criteria are met, we have
 15 no other regulatory responsibilities over the interim use of the property.”). Because Sound
 16 Transit’s easement contains a clause that explicitly states that its use of the corridor is subject to
 17 the reactivation of freight rail service, the STB will not bar Sound Transit from constructing a
 18 light rail. (See Dkt. 83-12 at 8 (“Sound Transit...may be required to, and will if so required,
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² This is why Plaintiffs’ argument that Sound Transit is not a bona fide railroad under the STB is irrelevant. Sound Transit is not a railroad for the purposes of the STB because it is a local government authority operating a passenger railroad. But this is precisely why Sound Transit *can* construct a light rail in the corridor: because it is constructing a passenger railroad, it does not need to petition the STB for reactivation. *See* 49 U.S.C. § 10901(a) (requiring STB authorization when constructing railroads).

1 make available some or all of [its] respective interests in the Property to accommodate
2 reactivated freight rail service.”)

3 Because the STB does not have jurisdiction over Sound Transit’s planned light rail, the
4 only question is whether Sound Transit’s easement permits its construction. In order to determine
5 the scope of Sound Transit’s easement, we next turn to Washington law.

6 **B. Sound Transit’s Easement Permits the Construction of a Light Rail**

7 We have already ruled that the Corridor Easements enable the easement holder to use the
8 area on, above, and below the surface of the easement for railroad, trail, and other incidental
9 purposes. (Dkt. No. 138 at 18.) We have also held that, under Washington law, the scope of an
10 easement is determined by “the intention of the parties to the original grant, the nature and
11 situation of the properties subject to the easement, and the manner in which the easement has
12 been used and occupied.” *Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wash. App. 209, 215 (2002).

13 Sound Transit wishes to construct a passenger light rail, and there is no indication that
14 either of the Corridor Easements excludes this use. Neither of the conveyances granting the
15 Corridor Easements limits its scope specifically to freight railroads. (Dkt. Nos. 113-6 at 1 and
16 113-7 at 1-2.) Washington caselaw is conclusive that a “railroad” can mean either a passenger or
17 freight railroad. *See Zobrist v. Culp*, 95 Wash.2d 556, 561 (1981) (“[W]hen a railroad is
18 ‘operating,’ it is furnishing transportation, either freight or passenger, to the public.”). Therefore,
19 if the grantor of either easement intended to limit its scope to freight railroads, this limitation
20 needed to be explicit. *See Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass’n*,
21 156 Wash. 2d 253, 272 n.15 (2006) (holding that where the language of a conveyance is
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1 ambiguous, it is construed against the grantor). We thus construe the Corridor Easements against
 2 their grantors and find that, as a matter of law, they do include passenger railroads.³

3 Next we must determine whether Sound Transit's proposed light rail is a railroad
 4 encompassed by the Corridor Easements. The proposed light rail fits with the caselaw definition
 5 of a railroad: it transports passengers along a steel track to fixed destinations. *See Zobrist*, 95
 6 Wash.2d at 561 ("[A railroad's] operating property is devoted to the public service of
 7 transportation over lines and terminals having a fixed location."). Although the light rail will run
 8 via an electric-powered catenary system, the Corridor Easements do not explicitly cover only
 9 certain kinds of railroads, for example those that run on diesel. (Dkt. Nos. 113-6 at 1 and 113-7
 10 at 1-2.) Plaintiffs have also admitted that electric-powered locomotives are within the scope of
 11 the Corridor Easements. (Dkt. No. 120-5 at 3.) This concession was limited to freight railroads,
 12 but as we have already explained, the Corridor Easements themselves include passenger rails.
 13 Therefore, if Plaintiffs concede that electric-powered freight railroads are included in the
 14 Corridor Easements, there is no logical reason why this concession should not extend to electric-
 15 powered passenger railroads as well.

16 Finally, the *Haggart* court itself specifically contemplated the future existence of a
 17 passenger light rail when it calculated the amount of Plaintiffs' taking. *Haggart v. United States*,
 18 108 Fed. Cl. 70, 96 (2012) ("The "after" is uncontested: after the NITU issued, qualifying
 19 plaintiffs had property burdened by a general easement permitting recreational trail use with the
 20 potential for future railway use by way of rail-banking or possible future development of a
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 25 ³ As Sound Transit points out, BNSF actually operated a passenger railroad in the
 26 corridor. (Dkt. No. 119 at 15-16.) This also indicates that the Corridor Easements encompass
 passenger railroads. *See Kershaw Sunnyside Ranches*, 156 Wash. 2d at 272 n.15 (holding that the
 conduct of the parties subsequent to a grant may be considered in determining its scope).

1 commuter rail line.”). Plaintiffs’ expert, John Kilpatrick, confirmed that Plaintiffs were already
2 compensated for this use in his declaration accompanying Plaintiffs’ opposition to King County
3 and the Port’s joint cross-motion for summary judgment. (Dkt. No. 131-4 at 6) (“In the ‘after’
4 condition, Plaintiffs’ parcels will be valued subject to the present encumbrance—an easement for
5 recreational trail use subject to possible reactivation as a railroad, including light rail.”).
6 Therefore, Plaintiffs have effectively conceded that a passenger light rail is covered by the
7 Corridor Easements, and cannot argue otherwise.
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9 Thus the Court finds that, as a matter of law, Sound Transit’s planned light rail is within
10 the scope of the preserved BNSF easements, and may be constructed on, above, and below
11 ground consistent with its purpose as a railroad.

12 **III. CONCLUSION**

13 For the foregoing reasons, defendant Sound Transit’s motion for summary judgment
14 (Dkt. No. 119) is GRANTED.

15 DATED this 10 day of November 2015.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE